Filed 11/27/13 Marriage of Williams CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of MERA D. and ERIC R. WILLIAMS.	
MERA D. WILLIAMS, Appellant, v. ERIC R. WILLIAMS, Respondent.	G048939 (Super. Ct. No. SBFSS 92699) O P I N I O N

Appeal from an order of the Superior Court of San Bernardino County, Brian Saunders, Judge. Dismissed.

David B. Dimitruk for Appellant.

Law Offices of Pittullo, Barker & Associates, P. Timothy Pittullo; Law Offices of William Edgar and H. William Edgar for Respondent.

Husband filed an order to show cause (OSC) to modify spousal and child support. Although after several years of continuances of trial the OSC had yet to be ruled on, the trial court issued a minute order stating any modification of support would be retroactive to the date the OSC was filed. Wife appeals from that order. We conclude the order is not appealable and dismiss the appeal.

FACTS & PROCEDURE

Mera D. Williams filed a petition for dissolution of her marriage to Eric R. Williams[1] on April 19, 2006. On August 14, 2006, the trial court issued a support order requiring Eric to pay Mera $1,601 in child support and $687 in spousal support per month.

On September 2, 2008, Eric filed an OSC to modify support to guideline amounts due to the recent loss of his job. The support modification OSC was set for hearing on November 20, 2008, before San Bernardino County Superior Court Judge Brian Saunders. There were other issues remaining to be litigated as well, including division of community property and attorney fees.

Over the next three years, while the case remained before Judge Saunders, there were various continuances, trial dates were set and vacated, and status conferences were held at which sometimes the support modification OSC was mentioned and other times not. The minute orders show the following progression of the support modification OSC and the dissolution action before Judge Saunders.

The hearing on the support modification OSC was continued three times to April 16, 2009. The minute order from April 16, 2009, concerning the hearing on the support modification OSC, refers to another minute order of the same date, and the other

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[1] As is the custom in family law cases, we hereafter refer to the parties by their first names for ease of reading and to avoid confusion, and not out of disrespect. (*In re Marriage of James & Christine C.* (2008) 158 Cal.App.4th 1261, 1264, fn. 1.)

minute order states a trial setting conference was set for May 29, 2009, and trial was set for June 17, 2009, on "financial issues, [support, and] property." At the May 29, 2009, trial setting conference, the parties announced ready for trial on June 17, 2009. On June 17, 2009, Mera's attorney showed up unprepared for trial, and the trial date was reset for August 26, 2009.

On August 21, 2009, the trial date was vacated and reset for October 28, 2009. That minute order stated the issues to be resolved at time of trial are "CC/CV" (apparently referring to child custody and child visitation); there was no mention of the support modification OSC. On October 28, 2009, the trial date was moved to January 27, 2010, again with the minute order indicating the issues to be decided were custody and visitation. On January 27, 2010, the parties stipulated to continue trial to a "mutually agreeable date," and the matter was ordered off calendar.

On April 16, 2010, the court heard a different OSC regarding custody and visitation. On June 17, 2010, it set trial dates for September 21 and 22, 2010, and October 19 and 20, 2010, on the issues of support, attorney fees, and property. On September 21, 2010, Mera's counsel failed to appear for trial. The court vacated the September 22, 2010, trial date but left the October 19 and 20, 2010, trial dates. On October 13, 2010, the court permitted new counsel to substitute in for Mera, vacated the trial date, and set a trial setting conference for December 17, 2010. At the trial setting conference on December 17, 2010, the court set a new trial date for a four-day trial starting on April 6, 2011, on "all remaining issues."

Trial began on April 6, 2011, and the question came up as to whether support orders could be made retroactive to the date the support modification OSC was filed—Mera argued they could not because the support modification OSC had gone off calendar and had never been reset for hearing and thus was no longer pending.

On April 19, 2011, the fourth day of trial, Mera's counsel asked for a continuance because he was ill. The trial was continued to July 19, 2011, on child support and all remaining issues.

On July 19, 2011, Judge Saunders declared a mistrial "as to all issues except the bifurcated issue of retro-activity" of support. The matter was reassigned to a new trial judge to decide all issues except the issue of whether any change in support would be retroactive to the date Eric filed the support modification OSC.

On August 22, 2011, Judge Saunders issued the minute order that is the subject of this appeal, finding the support modification OSC was intended to proceed to trial. Therefore, any support modification would be retroactive to September 2, 2008. Mera filed a notice of appeal from this minute order.

After Mera filed her notice of appeal from the August 22, 2011, minute order, the appellate court ordered her to file a letter memorandum of points and authorities establishing the appealability of the minute order because, "[T]he record is uncertain whether the order appealed is a final order modifying an appealable order setting support . . . the minute order indicates only a decision on the retroactive scope of an order to show cause." After Mera filed her memorandum, the appellate court ordered the issue would be decided in conjunction with the appeal.

DISCUSSION

Mera contends the August 22, 2011, minute order is appealable because it modifies the 2006 support order. We disagree.

"It is settled that the right to appeal is strictly statutory, and a judgment or order is not appealable unless made so by statute. [Citation.] In civil matters, Code of Civil Procedure section 904.1 is the main statutory authorization for appeals. Code of Civil Procedure section 904.1, subdivision (a)[,] provides in relevant part that an appeal may be taken from: a final judgment (subd. (a)(1)); an order made after an appealable judgment (subd. (a)(2)); or 'an order made appealable by the provisions of the Probate

Code or the Family Code' (subd. (a)(10))." (*Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1377.) Family Code section 3554,[2] provides, "An appeal may be taken from an order or judgment under this division as in other civil action."

Although section 3554 provides orders are appealable, "this does not literally mean that *any* [Family Law] order . . . is appealable." (*In re Marriage of Ellis* (2002) 101 Cal.App.4th 400, 403 (*Ellis*).) "When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken. [Citation.]" (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368 (*Skelley*).) Accordingly, an order for temporary support, or an order modifying a temporary support order, is directly appealable. (*Ibid.*; *In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 595.)

In determining if an order is appealable, we look to its substance. (*Skelley, supra,* 18 Cal.3d at p. 368.) Mera contends the August 22, 2011, minute order is appealable because it modifies the 2006 support order, which was itself a final appealable order. The minute order did not modify the 2006 support order or any other support order for that matter. It is simply an interlocutory order stating what will happen *if* support is modified, but the issue of whether support will be modified and the amount of any modification has yet to be determined.

Ellis, supra, 101 Cal.App.4th 400, is instructive. In *Ellis*, the trial court bifurcated the issue of whether there was a community property interest in a medical subsidy available to husband upon his retirement from the issue of evaluating the amount of any community property interest. The court found there was a community property interest and set a future hearing date to determine its value. Husband appealed from the order finding a community property interest. The appellate court found the order was not

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[2] All further statutory references are to the Family Code.

appealable "because it is interlocutory in nature, merely preliminary to an anticipated final order evaluating and dividing the asset." (*Id.* at p. 403.)

Here, Eric filed an OSC to modify the 2006 support order, but the support modification OSC has not been decided. The August 22, 2011, minute order from which Mera appeals was merely the trial court's pronouncement that modification of support—if in fact there is any such modification—would be retroactive to the date the support modification OSC was filed in 2008. As in *Ellis, supra*, 101 Cal.App.4th 400, the August 22, 2011, minute order was merely an interlocutory ruling made in contemplation of some future ruling on the support modification OSC. The retroactivity ruling must be reviewed on appeal from the order modifying support. Although there is a procedure in family law cases for obtaining certification for an interlocutory appeal on a bifurcated issue (§ 2025; Cal. Rules of Court, rule 5.392), that procedure was not followed here. Accordingly, the appeal must be dismissed as from a nonappealable order. (*In re Marriage of Griffin* (1993) 15 Cal.App.4th 685, 689.) Mera's reliance on *In re Marriage of Gruen* (2011) 191 Cal.App.4th 627, is misplaced as that case concerned orders that actually modified the amount of support.

Mera and Eric both suggest that if the order is not appealable, we should nonetheless exercise our discretion to treat Mera's appeal as a writ within our original jurisdiction so as to decide the retroactivity issue now. (See *Ellis, supra,* 101 Cal.App.4th at p. 404.) An appellate court has discretion, in exceptional situations, to treat a purported appeal from a nonappealable order as a petition for writ of mandate. (*H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366-1367.) That discretion, however, should be exercised only in unusual and extraordinary circumstances. (*Ibid*.) This is not such a circumstance—it would do little to promote judicial economy to decide the retroactivity of an order that has yet to be made. Indeed, Mera herself has provided us confirmation of our concerns in this regard. In connection with her October 18, 2012, request for an extension of time to file her appellant's reply

brief, Mera's counsel provided the court with a copy of a statement of decision signed and entered on September 25, 2012, by the trial court that tried the issue of modification of temporary support after Judge Saunders declared a mistrial. In its statement of decision, the trial court found the support modification OSC *had* gone off calendar (as Mera asserts) and was never reset for hearing. Thus, not only could support not be modified retroactively, but there was no jurisdiction to modify support at all because there was simply no pending motion or OSC for modification of support pending. Accordingly, the trial court declined to make *any* order modifying support "at this time." In other words, it appears the matter may well have become moot. (See *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214 [appeal moot when no effective relief can be granted].)

DISPOSITION

The appeal is dismissed. Respondent is awarded his costs on appeal.

O'LEARY, P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.